IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1137 of 2003

in

SPECIAL CIVIL APPLICATIONNo 1848 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANHAR K DARJI

Versus

AHMEDABAD MUNICIPAL CORPORATION

Appearance:

1. LETTERS PATENT APPEAL No. 1137 of 2003

MR KIRIT I PATEL for Appellant No.

NANAVATI & NANAVATI for Respondent No. 1

RULE SERVED for Respondent No. 1,2

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA

and

HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 29/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The appellant - petitioner Shri Manhar K Darji was appointed as Legal Assistant in the respondent Ahmedabad Municipal Corporation on 24.05.1999 on probation for a period of one year. Before the expiry of period of his probation, his services came to be terminated by an order dated 16.05.2000. It was challenged by him by way of special civil application no. 5004 of 2000 which was admitted on 06.07.2000 by the learned single Judge of this Court and by a speaking order ad-interim relief granted earlier was confirmed. However, while confirming the ad-interim relief against his termination, it was clarified by Her Lordship that it shall be open to the respondent - Corporation to make independent assessment of the petitioner's performance and to make suitable orders in respect of termination of the period of probation.

In pursuance of the aforesaid order dated 06.07.2000 passed by Ms.R.M.Doshit, J in special civil application no. 5004 of 2000, the respondent Corporation made independent assessment of the petitioner's performance and having found him not fit, terminated his services on the expiry of period of his probation by an order dated 27.02.2001 (Annexure `C' to the main petition). It was initially challenged by the appellant - petitioner by way of special civil application no. 2397 of 2001 before this Court. However, no interim relief was granted in his favour this time and simple order of notice was passed. In response to that notice, reply affidavit was filed by the respondent Corporation in that petition and rejoinder to which also was filed as stated at the bar by the learned counsel for the parties. Be that as it may. When that special civil application no.2397 of 2001 was placed before another learned single Judge (M.S.Shah, J) on 04.09.2002, learned counsel for the appellant - petitioner sought permission to withdraw that petition, as, the petitioner was desirous of pursuing the representation made by him on 17.04.2001 to the Municipal Commissioner, Ahmedabad against his fresh order of termination dated 27.02.2001. Accordingly, permission was granted and Municipal Corporation, Ahmedabad was directed to decide his representation as expeditiously as possible, preferably within one month

from the date of the receipt of the order (Annexure `D' to the main petition). In pursuance of the order dated 04.09.2002 passed by M.S.Shah, J in special civil application no. 2397 of 2001, the Municipal Commissioner of the respondent Corporation rejected his representation by speaking order running into four type pages (Annexure `E').

#. Aggrieved of the aforesaid order of rejection of his representation, the appellant - petitioner once again approached this court by way of special civil application no. 1848 of 2003 which was dismissed in limine by another learned single Judge (Jayant Patel, J) by his order dated 25.02.2003. The same is challenged in this appeal by the appellant - petitioner.

#. Preliminary objection was raised by the learned counsel Shri Shukla for entertaining this appeal on the ground that his earlier writ petition i.e. special civil application no. 2397 of 2001 challenging his termination order dated 27.02.2001 passed by the respondent Corporation was dismissed as withdrawn by M.S.Shah, J on 04.09.2002 without reserving liberty to the appellant petitioner to file fresh petition challenging his impugned order of termination and the order passed by the authority on his representation. In support of his submissions, Mr.Shukla relied on the judgment of the Hon'ble Supreme Court in case of Avinash Nagra Vs. Navodaya Vidyalaya Samiti and others, reported in (1997)2 SCC 534 wherein the Hon'ble Supreme Court has held that where the first writ petition challenging the order of termination of service was withdrawn without grant of liberty by the court to file second writ petition, then the second writ petition for that very purpose was not maintainable, as, it was barred by constructive res-judicata. However, learned counsel Shri Patel for the appellant - petitioner submitted that in a recent judgment in case of V.D.Barot Vs. State of Gujarat and others, reported in (2002)10 SCC 668, the Hon'ble Supreme Court has held that the second petition after withdrawal of the first petition would be maintainable. It is, no doubt, true that in Barot's case (supra), the Hon'ble Supreme Court has held that rejection of representation ought to have been examined by the High Court in the second writ petition. However, from careful reading of the judgment of the Hon'ble Supreme Court in Barot's case, it is clear that previous judgment of the coordinate Bench of the Hon'ble Supreme court in the case of Avinash Nagra (supra) was not brought to Their Lordships' notice and without considering the said judgment, the Hon'ble Supreme Court took a totally

different view in the matter and held that second petition would be maintainable. However, Mr.Patel for the appellant - petitioner submitted that this court is bound by the latest pronouncement of the Hon'ble Apex Court. It is, no doubt, true that in the case of Barot (supra), the Hon'ble Supreme Court has held that second petition ought to have been considered by the High court. However, it may be stated that in Barot's case, what was challenged by the petitioner was the mere rejection of representation and not his earlier order of termination which is clear from para 4 of the judgment of the Hon'ble Supreme Court, whereas in the instant case, the appellant petitioner was challenging both fresh order of termination dated 27.02.2001 passed by the respondent Corporation as well as rejection order dated 18.10.2002 passed by the Municipal Corporation rejecting his representation against his termination. Thus, in the guise of challenging the order of respondent Corporation rejecting his representation, it would not be open to the appellant - petitioner to challenge his earlier order of termination dated 27.02.2001. It has been consistently held by the Hon'ble Supreme Court that if the first writ petition is withdrawn without reserving liberty to file fresh petition, then the second petition would not be maintainable on the same subject. In view of the above, we are of the considered opinion that the learned single Judge rightly dismissed the writ petition of the appellant - petitioner on the ground of constructive res-judicata.

#. Even assuming for the sake of argument that second writ petition was maintainable before this Court after rejection order passed by the respondent - corporation rejecting his representation against his earlier order of termination, then also, we would not like to interfere with such termination order dated 27.02.2001 passed by the respondent - Corporation and the subsequent order dated 18.10.2002 rejecting the appeal of the appellant petitioner, as, the work of the appellant - petitioner as Legal Assistant was not found satisfactory by the respondent - Corporation. It was submitted by Mr.Patel for the appellant - petitioner that terminating the services of the appellant - petitioner by stating that it was found unsatisfactory would amount to casting stigma against the appellant petitioner and without holding regular inquiry against the appellant petitioner, his services could not have been terminated. In support of his submission, Mr.Patel has relied on the judgment of the Hon'ble Supreme Court in the case of V.P.Ahuja V/s State of Punjab and others reported in 2000 AIR SCW 792. The said decision was rendered by the Hon'ble Supreme

Court relying on its previous judgment in the case of Dipti Prakash Banerjee V/s Satvendra Nath Bose National Centre, for Basic Sciences, Calcutta AIR 1999 SC 983. It is to be stated that in the latest judgment, the Hon'ble Supreme Court in the case of Registrar, High Court V/s C.G.Sharma, reported in 2004 AIR SCW 6687, it has considered not only its previous judgment in case of Dipti Prakash Banerjee (supra) but also considered as many as 19 other previous judgments and held that termination on the ground that the work was not found to be satisfactory cannot be said to be a stigma. Such an order is an order of termination simpliciter and not by way of punishment. Therefore, there was no question of holding regular inquiry against the petitioner.

#. In view of the latest judgment of the Hon'ble Supreme Court in case of C.G.Sharma (supra), this appeal is required to be dismissed, as, in our considered opinion, on merits also, the appellant - petitioner had no case and it was rightly dismissed by the learned single Judge.

#. In view of above, this appeal fails and is hereby dismissed.

(B.J.SHETHNA, J)

(SHARAD D DAVE, J)

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